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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No. 1029

FERDINAND A. KERTESS and CHEMICAL MAR-
KETING COMPANY, INCORPORATED,
Petitioners,

against

THE UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT, AND BRIEF IN
SUPPORT THEREOF

JOSEPH H. BRODERICK,
Attorney for Petitioner.



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**PETITION FOR A WRIT OF CERTIORARI TO THE
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FOR THE SECOND CIRCUIT**

*To the Honorable, the Chief Justice, and the Associate
Justices of the Supreme Court of the United States:*

The petitioner, Ferdinand A. Kertess, respectfully prays that a writ of certiorari issue to review the order of the United States Circuit Court of Appeals for the Second Circuit, entered in the case herein on April 13th, 1942 (R. 12), dismissing the appeal taken by him, individually and as sole owner of all of the outstanding shares of the capital stock of Chemical Marketing Company, Incorporated, from the judgment or order of the United States District Court for the Southern District of New York, entered February 17th, 1943, granting leave to the Alien Property Custodian to intervene on behalf of Chemical Marketing Company, Incorporated, and change its plea of not guilty to four indictments to a plea of *nolo contendere*.

Jurisdiction of This Court

This petition is filed within thirty (30) days from the date of the entry of the order for mandate, in accordance with the provisions of Rule 11 of the Rules of Practice and Procedure in criminal cases after a plea of guilty, verdict or finding of guilt. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938), U. S. Code, Title 28, Sec. 347, and by Sections 687, 688, 689, U. S. Code, Title 18.

Opinions Below

There were no opinions written in the District Court or the Circuit Court of Appeals.

Statement

The petitioner, Ferdinand A. Kertess, a naturalized citizen of the United States, was indicted in the United States District Court for the Southern District of New York under four separate indictments filed on November 4th, 1942, charging the unlawful exportation and conspiracy to export certain platinum group metals in violation of a Presidential proclamation,* prohibiting the export of such metals without a license. Also indicted with petitioner were Chemical Marketing Company, Incorporated, a New York corporation, and other persons, named but unapprehended. At the time of the filing of these indictments, the petitioner was President and sole owner of all of the capital shares of common stock of Chemical Marketing Company, Incorporated, a corporation organized under the Laws of the

* Proclamation No. 2413, July 2, 1940, as amended, promulgated under authority of the Act of July 2, 1940, C. 508, 54 Stat. 714; U. S. C. A. Title 50, Appendix Sec. 701.

State of New York. The petitioner retained counsel for himself and the Chemical Marketing Company, Incorporated, and pleas of not guilty were entered for both on November 6, 1942 and on January 15, 1943 a formal notice of appearance was filed by their attorney. On February 17th, 1943, an application was made to the United States District Court by the Alien Property Custodian, who had in the meantime seized all the stock of Chemical Marketing Company, Incorporated, from petitioner, for leave to intervene in the action and change the plea of not guilty theretofore interposed for the defendant, Chemical Marketing Company, Incorporated, to *nolo contendere*.

The right of the Alien Property Custodian to supersede counsel duly appointed for Chemical Marketing Company, Incorporated, and intervene in the action was predicated upon an order of the Alien Property Custodian, issued under the authority of the Trading With the Enemy Act, as amended, and Executive Order No. 9095, as amended, determining that Ferdinand A. Kertess is a national controlled by, or acting for and on behalf of a designated enemy country (Germany), and vesting in the Alien Property Custodian the shares of stock owned by Ferdinand A. Kertess in the Chemical Marketing Company, Incorporated.* Under the compulsion of this order, 200 shares of stock of Chemical Marketing Company, Incorporated, constituting all the outstanding capital stock of said corporation, were transferred by Ferdinand A. Kertess to the Alien Property Custodian, but the right to contest the validity of this action was expressly reserved. New officers and directors were caused to be elected to the corporation by the Alien Property Custodian and the attorney representing the interests of the corporation was discharged.

* Alien Property Custodian Vesting Order No. 373 (R. 6).

After oral argument, the District Court granted the application of the Alien Property Custodian and entered an order accepting a plea of *nolo contendere* for the defendant, Chemical Marketing Company, Incorporated. Ferdinand A. Kertess, individually, and as equitable owner of all of the shares of the capital stock of Chemical Marketing Company, Incorporated, filed notices of appeal from this order to the Circuit Court of Appeals of the Second Circuit.

The Custodian made a motion to dismiss the appeal thus taken on the ground that the Chemical Marketing Company, Incorporated, had not authorized the taking of said appeal on its behalf and that the defendant-appellant, Ferdinand A. Kertess, petitioner, had no standing to take said appeal. This motion was granted without opinion by the Circuit Court of Appeals and an order was entered April 13th, 1943, dismissing the appeal (R. 12).

Questions Presented

1. Does the petitioner, Ferdinand A. Kertess, a naturalized citizen of the United States, have the power, right and authority to select counsel to appear, defend, appeal and represent in criminal proceedings, the Chemical Marketing Company, Incorporated, a New York corporation, all of whose capital stock has been seized from him by the Alien Property Custodian?

2. Is the Alien Property Custodian vested with power to seize stock representing ownership and control by an American citizen of a New York corporation and authorized to intervene in a criminal proceeding against such

corporation, dominating the defense to the criminal charges to the exclusion of the person from whom title was derived by the seizure?

Specification of Errors

The Circuit Court of Appeals erred:

1. In granting the motion of the Alien Property Custodian to dismiss the appeal from the order of the District Court without considering the merits of the appeal.

2. In permitting the Alien Property Custodian to dominate the defense of the Chemical Marketing Company, Incorporated, to the exclusion of its former owner and ultimate beneficiary.

3. In accepting the plea of *nolo contendere* and thereby denying Chemical Marketing Company, Incorporated, the right to a trial on the indictments.

Reasons for the Allowance of the Writ

There do not seem to be any applicable decisions by this Court on the questions presented in the foregoing petition, although some phases of the problem have been considered in several of the District Courts where the Alien Property Custodian attempted to intervene and dominate admiralty proceedings instituted against enemy owned vessels. One line of cases holds that the Alien Property Custodian is not entitled to be substituted in the place and stead of the enemy claimants and excluding them from defending the libels for forfeiture (*U. S. v. Italian Steam Vessel Pietro Campanella* and *U. S. v. Italian Steam Vessel Euro*, 1942 A. M. C. 1387, 47 F. Supp. 374 (D. Md.); *The Odenold*, 1942 A. M. C. —); whereas the other line of cases holds the opposite view (*United States of America v. The Vessel Antoinetta*, 1943, A. M. C. 305, E. D. of Pa.). The Cus-

todian's assumption of the right to intervene and dominate the criminal proceedings against the Chemical Marketing Company, Incorporated, constitutes an arrogation of authority far beyond the scope of his statutory powers. The entry of the plea of *nolo contendere* on the application of the Custodian aggravates the injustice to the petitioner and usurps the right to trial. The decisions below constitute a departure from the accepted and usual course of judicial procedure and requires the exercise of this Court's supervisory powers. The problem is of such national scope and importance that it should be clarified and settled by this Court. The administration of criminal justice in the Federal Courts would benefit by the establishment of an authoritative precedent.

WHEREFORE, petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding that Court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record of all proceedings of the said Circuit Court of Appeals in this case; and that the judgment and order of the said Circuit Court of Appeals be reversed and that petitioner be granted such other and further relief as to this Honorable Court may seem just and proper.

FERDINAND A. KERTESS,
Petitioner.

JOSEPH H. BRODERICK,
Attorney for Petitioner.





BRIEF IN SUPPORT OF PETITION

Statement

The attention of the Court is respectfully invited to the petition which contains a specific statement of the case (Petition, *ante*, pp. 2-4), and the specification of errors now urged (Petition, *ante*, p. 5). For the sake of brevity these statements are not repeated here.

Statutes Involved

The statutes involved are the provisions of the Trading With the Enemy Act of 1917, C. 106, 40 Stat. 411, 50 U. S. C. A., as amended by the First War Powers Act of 1941, C. 593, 55 Stat. 838, 50 U. S. C. A., Appendix, and Executive Order No. 9095, as amended July 6, 1942, by Executive Order No. 9193. Pertinent parts of the statute are annexed to the Appendix herein.

ARGUMENT

The Alien Property Custodian has no authority or power to intervene and dominate the defense in a pending criminal proceeding against a New York corporation whose capital stock he has seized from a citizen of the United States.

The action of the Alien Property Custodian clashes with fundamental concepts of the true administration of American criminal justice and is tantamount to an unwarranted

preclusion of basic rights. From whatever aspect the matter may be viewed, the conclusion is inescapable that there is no reasonable basis to deny to the Chemical Marketing Company, Incorporated, the right to a fair, impartial trial on the issues formulated by the charges against it. If the Alien Property Custodian has the power and authority to appear, plead and dominate the defense to these indictments for the alleged perpetration of criminal acts preceding the date of seizure by him, then the Government is the dominating party of both the prosecution and defense. Moreover, the determination by the Custodian that the corporation has no defense to the charges contained in the indictments, completes the anomalous picture and places the Government in the position of acting as judge, as well as prosecutor and defendant.

If the Alien Property Custodian is legally vested with the broad powers he claims, then the petitioner has no just cause of complaint and, conversely, if he does not have these powers, then the order of the District Court permitting him to intervene and dominate the corporation's defense to the indictments, excluding the former owner (petitioner) from any participation in the case, is clearly erroneous. The basic issue crystallized by the contentions of the litigants to this proceeding, therefore, concerns the nature, scope and extent of the powers vested in the Custodian.

It is well to remember that the petitioner is a naturalized citizen of the United States, and that prior to the vesting order of the Custodian, he was the sole owner of all of the authorized shares of stock of the Chemical Marketing Company, Incorporated, which was organized under the Laws of the State of New York. The transfer of title to all of these shares of stock by the petitioner to the Custodian, was not

a voluntary act on his part and the validity of the vesting order is a matter subject to judicial consideration under the provisions of Section 9(a) of the Trading With the Enemy Act. These facts are stressed solely for the purpose of indicating the nature of the petitioner's status and the extent of his interest and relationship to the corporation. He is affected by the act of the Custodian, because he is individually indicted along with the Chemical Marketing Company, Incorporated, and by reason of the fact that he was President of the corporation during the period covered by the indictments. His individual acts cannot be disassociated from his acts as President.

Since the scope of the powers of the Alien Property Custodian are challenged by the petitioner, the best approach to the construction of his statutory authority requires some examination of the Trading With the Enemy Act of 1917.* This Act was originally adopted as a war measure during the first World War, for the purpose of preventing any trade with, or help to, the enemies of the United States (Sec. 3). It established a regulatory system for control, seizure and administration of enemy owned property and authorized the appointment of an Alien Property Custodian by the President, with power to receive all money and property in the United States, due or belonging to an enemy or ally of an enemy, and to hold, administer and account for same in the manner provided under said Act (Secs. 5, 6, 7). The Custodian was vested with all the powers of a common law trustee with respect to all property conveyed or delivered to him with authority to manage and dispose of same, as though he were the owner thereof.

* Act of October 6, 1917 (C. 106, Sec. 1, 40 Stat. 411) entitled "An Act to define, regulate and punish trading with the enemy and for other purposes.

The property so acquired was to be held subject to the further Act of Congress after termination of the war (Sec. 12).

The authority of the present Custodian is derived from Executive Order No. 9095, March 11, 1942 (7 F. R. 1971), as amended July 6, 1942, by Executive Order No. 9193, which establishes the Office of the Alien Property Custodian and vests in him all the powers of the Trading With the Enemy Act of 1917, as amended by the First War Powers Act of 1941. During the time of war or during any other period of national emergency, the President is authorized to regulate, direct or prohibit any dealing in, or exercising any right with respect to any transaction involving any property in which any foreign country or national thereof has any interest, by any person or with respect to any property, subject to the jurisdiction of the United States, and that any property or interest of any foreign country or national thereof shall vest upon terms directed by the President in such agency or person as may be designated by him, and upon such terms and conditions as the President may prescribe. Such interest or property shall be held, administered, liquidated or sold for the benefit of the United States.

It seems clear that the whole purport and tenor of the Trading With the Enemy Act is to prevent the use of enemy owned or controlled property against the interests of the United States. There is little room to question the constitutionality of this Act or the general seizure powers of the Alien Property Custodian. Property seized by him effects a complete change of title and clothes him with all the rights of ownership subject, however, to the duty to hold such property available for any juristic purpose. His duty is essentially that of a trustee or conservator and requires him

to administer and conserve seized property until the ultimate disposition thereof by the Congress under Sec. 12 of the Act which provides that after the end of the war any claim of an enemy to any property shall be settled as Congress shall direct. In *Woodson v. Deutsche &c. Vormals* (292 U. S. 449, 454), it was stated that "While this suggests that confiscation was not effected or intended, it plainly shows that Congress reserved to itself full freedom at any time to dispose of the property as might be deemed expedient and to deal with claimants as it should deem to be in accordance with right and justice, having regard to the conditions and circumstances that might arise during and after the war * * *."

Congress delegated powers of seizure but never intended that the exercise of such authority was to accomplish a confiscation or forfeiture. Seized property is to be held for the benefit of the United States and vests complete title in the Custodian, yet this authority is not unlimited. If, for example, the seizure is erroneous or improper, an aggrieved person has a clear right to reclaim his property by a suit in Equity under Section 9(a) of the Act.* It is also notable that Section 5(b) is operative not only in war time but during any period of national emergency and any confiscation during peace time would undoubtedly violate the Constitution. It is arguable that the Custodian's power to sell, liquidate or sequester seized property implies the power to destroy and indicates confiscatory powers. However, the exercise of such powers would only effect a physical conversion of the property, without accomplishing destruction or dissipation. The power to confiscate is reserved to Congress.**

* *Behn, Meyer & Co. v. Miller*, 266 U. S. 457, 463; *Stoehr v. Wallace*, 255 U. S. 239.

** *Commissioner of Internal Revenue v. Stearns*, 65 F. (2d) 371.

The pattern of the entire Trading With the Enemy Act seems to establish the Alien Property Custodian as a trustee and conservator, and his powers should be construed in that light. His duty is to conserve values so that his administration will not of itself work a confiscation, which, by destroying the fund, would encroach on the power reserved by Congress to return equivalent values at the end of the war or make such other disposition as it deems appropriate. Obviously, by seizing the shares of the Chemical Marketing Company, Incorporated, from the petitioner and entering the plea of *nolo contendere* to the indictments, which is an admission of guilt,* the Custodian has subjected it to fines, penalties and forfeitures which would necessarily destroy the fund it is his duty to conserve.

To be sure, the petitioner, as a citizen of the United States, has a substantive right to contest the seizure of his property (Sec. 9a) but this right avails him but little, if in the interim his property is destroyed or diminished in value as a result of the action taken by the Custodian. The procedure whereby the Custodian was permitted to intervene and dominate the defense foreclosed the petitioner from defending his property. As a result the corporation is left to the tender mercies of the Government which is prosecuting the indictments and predetermining its guilt without benefit of trial by pleading *nolo contendere*. Such action is unwarranted and unjustified under any theory and certainly encroaches on the right to trial by jury. Unless the order permitting the Custodian to dominate the corporation's defense to the indictments is reversed, both the corporation and petitioner will be precluded from pursuing any legal means of defense to the criminal charges.

* *Hudson v. U. S.*, 272 U. S. 41.

The order excluding the petitioner from any further participation in the defense of the charges against his corporation is a mandate which finally disposes of the issue between him and the Alien Property Custodian. The Court undoubtedly has discretionary power to change a plea from not guilty to *nolo contendere* but if the Alien Property Custodian is not vested with the authority to intervene and dominate the corporation's defense, then the Court is without jurisdiction to make the order.

The action of the Alien Property Custodian in the circumstances outlined in this case has received the sanction of the lower courts, despite the protests of the petitioner, who is the real party in interest. The question is of considerable national importance and invites consideration by this Court.

Dated: May 14, 1943.

Respectfully submitted,

JOSEPH H. BRODERICK,
Attorney for Petitioner.

[APPENDIX FOLLOWS]



APPENDIX

Trading With the Enemy Act of 1917, C. 106, 40 Stat. 411, 50 U. S. C. A., as Amended

Section 5(b), as amended by the First War Powers Act of 1941, C. 593, Title III, Sec. 301, 55 Stat. 839, now reads:

“(1) During the time of war or during any other period of National emergency * * * the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by the means of instructions, licenses, or otherwise * * * (B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, * * * or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest, by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes * * *.”

Section 7(c) of the original Trading With the Enemy Act of 1917, provides in part:

“* * * whenever any such property shall consist of shares of stock or other beneficial interest in any corporation, * * * it shall be the duty of the Corporation * * * to cancel upon its * * * books

all shares of stock or other beneficial interest standing upon its * * * books in the name of any person or persons, or held for, on account of, or in behalf of, or for the benefit of any person or persons who shall have been determined by the President, after investigation, to be an enemy or ally of enemy, and which shall have been required to be conveyed, transferred, or delivered to the Alien Property Custodian or seized by him * * *."

Section 9(a) provides in part:

"Any person not an enemy or ally of an enemy claiming any interest, right or title to any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or the Treasurer of the United States * * * may file with the said Custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefore by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest thereon to which the President shall determine said claimant is entitled. * * * If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity * * * to establish the interest, right, title or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment or delivery to said claimant of the money or other property so held * * *. If suit shall be so instituted, then such money or other property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree * * *."

Executive Order No. 9095, March 11, 1942 7 F. R. 1971, as amended by Ex. Ord. No. 9193, July 6, 1942, 7 F. R. 5205, provides in part:

"2. The Alien Property Custodian is authorized and empowered to take such action as he deems necessary in the national interest, including, but not limited to, the power to direct, manage, supervise, control or vest, with respect to:

(a) any business enterprise within the United States which is a national of a designated enemy country and any property of any nature whatsoever owned or controlled by, payable or deliverable to, held on behalf of or on account of or owing to or which is evidence of ownership or control of any such business enterprise, and any interest of any nature whatsoever in such business enterprise held by an enemy country or national thereof;

(b) any other business enterprise within the United States which is a national of a foreign country and any property of any nature whatsoever owned or controlled by, payable or deliverable to, held on behalf of or on account of or owing to or which is evidence of ownership or control of any such business enterprise, and any interest of any nature whatsoever in such business enterprise held by a foreign country or national thereof, when it is determined by the Custodian and he has certified to the Secretary of the Treasury that it is necessary in the national interest, with respect to such business enterprise, either (i) to provide for the protection of the property, (ii) to change personnel or supervise the employment policies, (iii) to liquidate, reorganize, or sell, (iv) to direct the management in respect to operations, or (v) to vest;"

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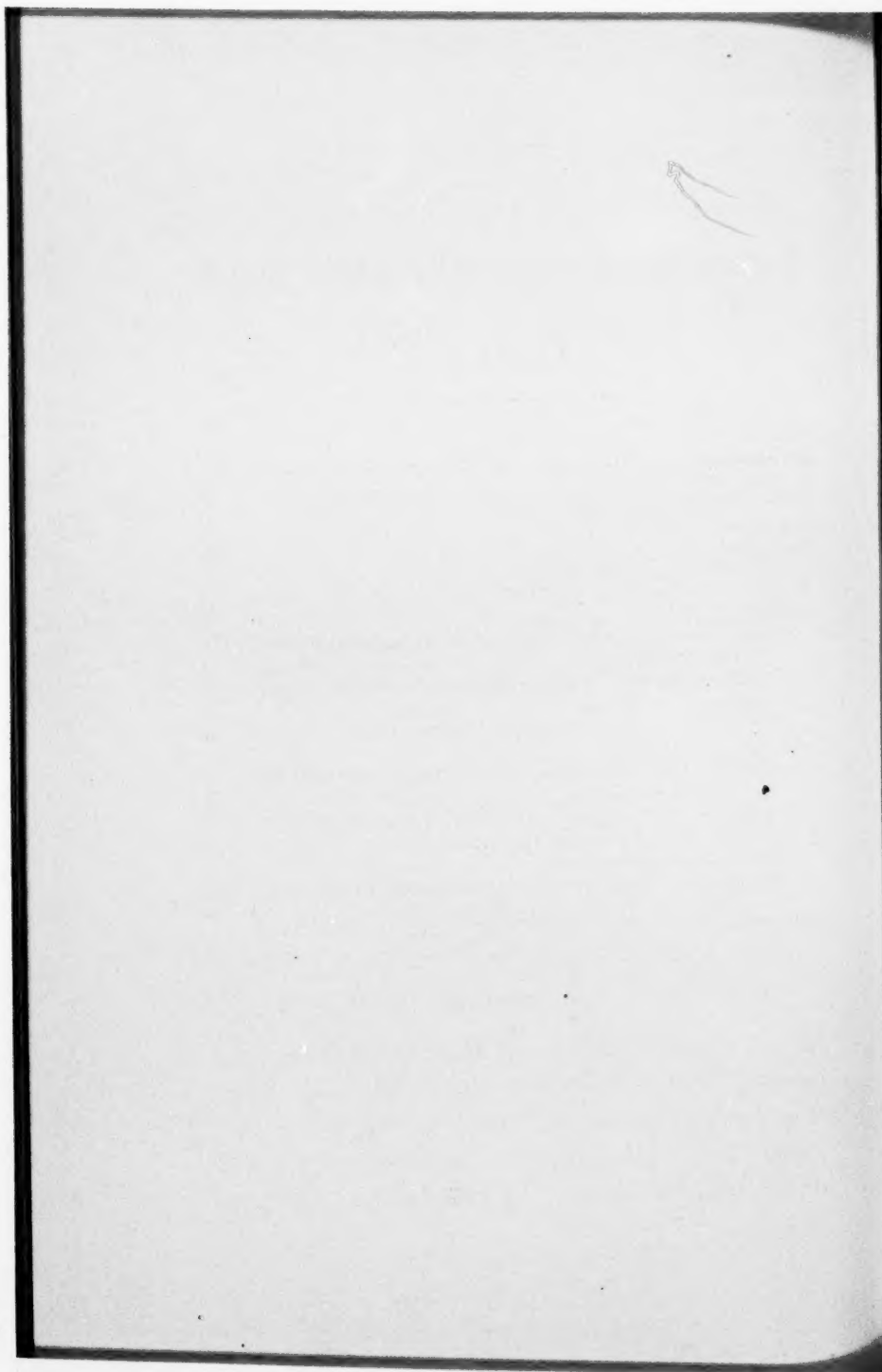
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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 1029

FERDINAND A. KERTESS AND CHEMICAL MARKETING
COMPANY, INCORPORATED, PETITIONERS

v.

THE UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE SECOND
CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The Circuit Court of Appeals entered, without opinion, the order which the petitioners seek to have reviewed.

JURISDICTION

The order of the Circuit Court of Appeals was entered on April 13, 1943 (R. 18-20). The petition for a writ of certiorari was filed May 17, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as

amended by the Act of February 13, 1925. See also Rule XI of the Rules of Criminal Procedure After Plea of Guilty, Verdict or Finding of Guilt, promulgated by this Court May 7, 1934.

QUESTION PRESENTED

The Alien Property Custodian vested all the shares of capital stock of a corporation and elected new directors who chose new officers. The question is whether the officers elected by the new directors may enter pleas of *nolo contendere* on behalf of the corporation with respect to indictments returned against it prior to the effective date of the vesting order of the Alien Property Custodian.

STATEMENT

The petitioner, Ferdinand A. Kertess, who is a naturalized citizen of the United States, retained his present counsel, Joseph H. Broderick, Esq., to defend him and his wholly owned corporation, Chemical Marketing Company, Incorporated, against four indictments charging unlawful exportation of and conspiracy to export certain metals of the platinum group in violation of the Proclamation of the President promulgated under the authority of the Act of July 2, 1940. (c. 508, 54 Stat. 714, U. S. C., Title 50, Appendix, Section 701.) On November 6, 1942, counsel entered pleas of not guilty for the individual petitioner and for the corporation.

On November 18, 1942, Leo T. Crowley, Alien Property Custodian, acting under the authority of the Trading with the Enemy Act of October 6, 1917 (c. 106, 40 Stat. 411, U. S. C., Title 50, Appendix, Section 5 (b)), as amended by the First War Powers Act of 1941 (c. 593, 55 Stat. 838, U. S. C. Title 50, Appendix), issued his Vesting Order No. 373, published on December 25, 1942, in 7 Federal Register 10890 (R. 2-3 and 12-13). In this Vesting Order the Custodian, after investigation, found that the petitioner, Ferdinand A. Kertess, was controlled by, or acting on behalf of, or as a cloak for, a designated enemy country, namely, Germany, or a person within such country, and determined, therefore, that petitioner was a national of that designated enemy country. The Custodian further found that the petitioner was the owner of all of the outstanding shares of stock of Chemical Marketing Company, Incorporated, and therefore determined that the business enterprise was a national of a designated enemy country, and proceeded to vest all of the outstanding shares of capital stock of the corporation "to be held, used, administered, liquidated, sold or otherwise dealt with in the interest of and for the benefit of the United States." On December 16, 1942, the Custodian, in his capacity as stockholder, caused a stockholders' meeting of the corporation to be held. At that meeting new directors were elected (R. 10-11), and on the same day the directors

met and elected Joseph A. Reilly president of the corporation (R. 11).

On January 15, 1943, Joseph A. Reilly, as president, advised Joseph H. Broderick, Esq., that his employment as attorney for Chemical Marketing Company, Incorporated, was terminated (R. 11).

On February 17, 1943, Joseph A. Reilly, as president of Chemical Marketing Company, Incorporated, applied to the United States District Court for the Southern District of New York for leave to enter pleas of *nolo contendere* on behalf of the corporation. In this application Mr. Reilly stated that, because of facts found by the Custodian and embodied in his vesting order, and because of additional facts learned by the Custodian and the present officers of the corporation from an examination of its files, it was the belief of the Custodian and of the present officers of the corporation that it had no defense to the indictment. The application then recited that the suggestion had been made that the entry of pleas of guilty on behalf of the corporation might prejudice the individual co-defendant Ferdinand A. Kertess, and in order to avoid any possibility of such prejudice, the corporation prayed the Court to accept its pleas of *nolo contendere*. (R. 1-4.)

The petitioner was notified that the application would be made and his counsel appeared and argued in opposition to it (R. 15).

The application was granted and the petitioner appealed "individually and as sole owner of all of the outstanding shares of stock of Chemical Marketing Company, Incorporated." In the notice of appeals Chemical Marketing Company, Incorporated, itself was designated as one of the appellants (R. 4).

The corporation moved to dismiss the appeals; its motion was supported by an affidavit subscribed by Leo T. Crowley, Alien Property Custodian. This affidavit sets forth the vesting of the stock and the subsequent actions taken by him as stockholder and by the new directors and officers of the corporation in their representative capacities. (R. 9-11.) A counter-affidavit was filed by the individual petitioner (R. 13-16). After argument the Circuit Court of Appeals granted the motion, "it appearing to the satisfaction of the Court that said defendant-appellant Ferdinand A. Kertess had, and has, no standing to take said appeals individually, and that the defendant Chemical Marketing Company, Incorporated, has not authorized the taking of said appeals, and that the defendant-appellant Ferdinand A. Kertess had, and has, no standing to take said appeals as the alleged sole owner of all of the outstanding shares of stock of the defendant Chemical Marketing Company, Incorporated, or on behalf of said corporation, in that he is not a stockholder, director, or officer of said corporation, all of whose shares of capital stock have been

vested by Leo T. Crowley, Alien Property Custodian of the United States" (R. 18-20). The present petitioner seeks to have this Court review the order of the Circuit Court of Appeals granting the motion to dismiss.

ARGUMENT

The petitioner does not challenge the constitutionality of the Trading with the Enemy Act, as amended, or the validity of the Executive orders issued thereunder. His attack is upon the scope of the powers of the Custodian. He asserts that the Custodian's present powers are those of a trustee and conservator for the enemy. But there is no support for this contention, either in the provisions of the original Trading with the Enemy Act or in the provisions of the Act as amended by the First War Powers Act of 1941. The effect of a seizure of property under the original Act was to divest the former enemy owner of every right with respect to such property and to vest "absolute" title in the United States. *Cummings v. Deutsche Bank und Discontogesellschaft*, 300 U. S. 115, 120, 121. That this is equally true under the provisions of Section 5 (b) of the original Act, as amended by the First War Powers Act of 1941, is indicated by the opinion in *Stern v. Newton*, 39 N. Y. Supp. (2d) 593 (Sup. Ct., N. Y. Co., decided February 5, 1943) and in the cases cited by the petitioners on page 5 of their petition.

The action complained of was taken by the Custodian in the exercise of the ordinary powers of a stockholder. The Custodian, having vested the controlling shares of capital stock of a corporation, may exercise all of the rights of a stockholder, even to the extent of assenting to the sale of all assets of the corporation. *Sielcken-Schwarz v. American Factors, Limited*, 60 F. (2d) 43 (C. C. A. 2). As the controlling stockholder, the Custodian is not free to expend funds beneficially owned by the United States in defense of a criminal proceeding if he believes that the corporate defendant has no defense.

The petitioner asserts that the Custodian cannot "dominate" criminal proceedings to which a corporation was made a party prior to the vesting of its shares of capital stock. The full effect of the Custodian's undoubted constitutional powers to make "captures on land and water" is not to be deemed curtailed because the corporation whose shares of stock have been vested is already a defendant in criminal proceedings. The Custodian, of course, does not seek to "dominate" the criminal proceedings against the petitioner Kertess. He is free to defend that action as he and his counsel may see fit. The Custodian seeks merely to exercise a stockholder's right, which Kertess would never have denied to himself while a stockholder.

The petitioner, Kertess, as the former owner of vested property, has the right to challenge the propriety of the vesting order of the Custodian, but this challenge cannot be made in this proceeding.

CONCLUSION

The decision below is correct. The petition raises no questions of substance. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

CHARLES FAHY,
Solicitor General.

ROBERT L. STERN,
Attorney.

JUNE 1943.

